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Supreme Court, U.S.
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No. 04-327

In the
Supreme Court of the United States

SSA GULF, INC.,

PETITIONER,

v.

EUNICE HERNANDEZ, INDIVIDUALLY AND
ON BEHALF OF DECEDENT, JOSEPH HERNANDEZ,

RESPONDENT.

On Petition For a Writ Of Certiorari To
The U.S. Court of Appeals for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

Petitioner's corporate disclosure statement was set forth at page ii of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This case presents the question whether the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* ("LHWCA"), wholly displaces and preempts state tort damages claims by longshore employees against their stevedore employers, so as to trigger federal question jurisdiction pursuant to 28 U.S.C. § 1331. The decision below conflicts with a holding of the Fourth Circuit, as well as with governing precedent from this Court regarding the "complete preemption" doctrine. Further, the decision below threatens a substantial disruption of the LHWCA scheme by enabling state courts – including state-court judges and *juries* – to decide questions of LHWCA benefits and coverage in inconsistent and non-uniform ways.

1. The Brief in Opposition ("BIO") only serves to underscore the need for this Court's review. The BIO argues that "Congress did **not** intend for the LHWCA to be the plaintiff's exclusive remedy against SSA Gulf. Mr. Hernandez had a choice between Louisiana law and the LHWCA in connection with his claim for pain and suffering (the 'survival claim')." BIO 9 (emphasis in original). Respondent advances a theory of "concurrent jurisdiction," under which an injured plaintiff may choose state law, "opt out of the compensation scheme, and sue in tort for his injuries." BIO 11. Respondent cites the decision of the Louisiana Supreme Court in *Poche v. Avondale Shipyards, Inc.*, 339 So.2d 1212 (La. 1976), *appeal dismissed*, 434 U.S. 803 (1977), where the court expressly *rejected* the propositions that "the 1972 amendments to the [LHWCA] have the effect of preempting the power of this state to provide a compensation remedy to maritime workers injured on our soil"; that "the need for uniformity in the field of admiralty law demands that federal law operate exclusively as to covered workers"; and that "the history and wording of the [LHWCA] evidence a Congressional intent that federal law in this area be preeminent." *Id.* at 1215. The court opined: "We do not agree with any of these

contentions." *Id.*

Yet this Court has taken precisely the opposite view, squarely holding that "[t]he liability of an employer under the Act is exclusive." *Norton v. Warner Co.*, 321 U.S. 565, 571 (1944); *see also Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 261 (1979); *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.*, 417 U.S. 106, 111-13 (1974); *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285-86 (1952).

At least eight circuits have similarly held that Congress intended for the LHWCA to serve as the *exclusive* remedy for longshore employees against their stevedore employees. *See, e.g.*, *Stewart v. Dutra Constr. Co.*, 343 F.3d 10, 14 (1st Cir. 2003), *cert. granted*, 124 S. Ct. 1414 (2004); *Gravatt v. City of New York*, 226 F.3d 108, 111 (2d Cir. 2000), *cert. denied*, 532 U.S. 957 (2001); *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, 938-39 (3d Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991); *Artis v. Norfolk & Western Ry.*, 204 F.3d 141, 144 (4th Cir. 2000); *Stowers v. Consolidated Rail Corp.*, 985 F.2d 292, 293 (6th Cir.), *cert. denied*, 510 U.S. 813 (1993); *Johnson v. Continental Grain Co.*, 58 F.3d 1232, 1235 (8th Cir. 1995); *Sample v. Johnson*, 771 F.2d 1335, 1346-47 (9th Cir.1985), *cert. denied*, 475 U.S. 1019 (1986); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523, 1527 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991).

Thus, Respondent's defense of the Fifth Circuit's judgment in this case only confirms the existence of a conflict among the lower courts on an important question of federal law. Respondent's position has been expressly repudiated by this Court and at least eight circuits. This Court's review is urgently needed.

2. Respondent seeks to distinguish the Fourth Circuit's decision in *In re CSX Transportation, Inc. v. Shives*, 151 F.3d 164 (4th Cir. 1998), on the ground that it "did not address the

complete-preemption doctrine." BIO 8. Respondent's argument is highly misleading. To be sure, the Fourth Circuit did not use the phrase "complete preemption." But it squarely held that "[t]he question of whether the LHWCA applies to a work-related injury is exclusively a federal question which Congress never intended for state courts to resolve." *Id.* at 167. *That* federal principle is why the Fourth Circuit "focused on whether the plaintiff was covered by the LHWCA based on the facts presented therein." BIO 8. Under Respondent's view, the same inquiry would be conducted by a state court, not a federal court. There can be no doubt that, if Respondent's state-court complaint had been filed in the Fourth Circuit, it would have been removed to federal court and dismissed. Under the decisions below, state-court complaints filed in the Fifth Circuit, if removed to federal court, will be remanded to state court instead. There is a thus a stark circuit conflict in this case.

The Fourth Circuit opined: "If we were to dismiss this appeal as unreviewable under 28 U.S.C. § 1447(d)" – the very disposition that Respondent urges in this case – "then we would be leaving in place a remand order which would commit to the state courts the decision of whether the LHWCA provided coverage to the employee. To follow that course would thus deprive the federal courts of their proper role in resolving this important issue and would circumvent Congress' intent that LHWCA coverage issues be resolved in the first instance by the Department of Labor and ultimately in the federal courts of appeals." 151 F.3d at 167. *Shives* is irreconcilable with the decision below.

3. Respondent's position also flies in the face of clear congressional intent and would upset the statutory balance carefully crafted by Congress. This Court has recognized that the LHWCA "was designed to strike a balance between the concerns of the longshoremen and harbor workers on the one hand, and their employers on the other." *Morrison-Knudsen Constr. Co. v. Director, Office of Workers' Compensation Programs, United*

States Dep't of Labor, 461 U.S. 624, 635 (1983). Vital to that balance is the principle of exclusivity that Respondent seeks to repudiate. Also vital is the need for "limited and predictable liability" (*id.*) that would be eliminated by injecting state courts into the LHWCA scheme.

This case illustrates the dangers against which Congress sought to guard. Under Respondent's view, different state courts could reach different results regarding LHWCA eligibility and benefits issues. Different state courts could adopt forms of damages inconsistent with the LHWCA's system of compensation, which is based on an employee's weekly wages. 33 U.S.C. §§ 908-10. For example, in this case Respondent seeks pain and suffering damages under state tort law that are not available under the LHWCA.

Respondent also seeks to apply the Louisiana state-court "exposure" rule for defining when an asbestos injury accrues, BIO 9-10 & n.4, which is inconsistent with the LHWCA rule that injury occurs at the time of manifestation. *See Castorina v. Lykes Bros. S.S. Co.*, 758 F.2d 1025, 1031 (5th Cir. 1985) ("Congress expressly rejected the 'time of last exposure' approach to determining the date of injury and recognized that it is the disability itself, not mere exposure to a toxic substance, that should trigger an injured worker's rights under the Act."), *cert. denied*, 474 U.S. 846 (1985).

Respondent maintains that each state court can decide for itself how to administer the LHWCA. Yet Respondent's reliance on *Poche v. Avondale Shipyards, Inc.*, 339 So.2d 1212 (La. 1976), demonstrates that the matter cannot be entrusted to the state courts. Respondents' own arguments demonstrate how the decision below threatens to eviscerate the congressional aims of uniformity, predictability, and limited employer liability.

4. Respondent suggests, only in a footnote, that "[a]nother exception to the LHWCA is for intentional torts." BIO 19 n.8. But Respondent did not contend, either before the district court

or the court of appeals, that this case might qualify for that exception. Neither court mentioned the issue in its decision. As this case comes to this Court, the decisions below do not rest in any way on the intentional tort exception to the LHWCA. Accordingly, this Court need not consider the intentional tort issue. This Court should grant review, reverse the decisions below, and leave for consideration on remand whatever arguments, if any, Respondent might have preserved regarding the intentional tort exception. In any event, those arguments would be frivolous.[1]

5. Respondent offers nothing in the way of analysis regarding this Court's recent decisions revising and clarifying the complete preemption doctrine, particularly *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003), and *Aetna Health Ins. v. Davila*, 124 S. Ct. 2488 (2004). Respondent maintains (BIO 9) that the

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[1] Respondent's state-court petition alleges only that the stevedore employers "knowingly conceal[ed]" certain information. ¶ 20. The very case cited by Respondent in fact holds that such allegations do not trigger the intentional tort exception. *See Charlot v. Bethlehem Steel Corp.*, 838 F. Supp. 312, 316 (E.D. Tex. 1993) ("The characterization of negligence as wanton or gross does not raise that negligence into intent nor does it affect the exclusiveness of the remedies provided by the compensation acts."); *see also Johnson v. ODECO Oil & Gas Co.*, 679 F. Supp. 604, 607 (E.D. La. 1987), *aff'd*, 864 F.2d 40 (5th Cir. 1989) ("Willful, wanton, and reckless misconduct is not the equivalent of an intentional tort. There must be proof of a specific intent by the employer to injure the employee."); *Austin v. Johns-Manville Sales Co.*, 508 F. Supp. 313, 317 (D. Me. 1981) ("Even if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering claimant to perform an extremely dangerous job, wilfully failing to furnish a safe place to work, or even wilfully and unlawfully violating a safety statute, this still falls short of the kind of actual intention to injure that robs the injury of accidental character.") (internal quotation marks and citation omitted); *Houston v. Bechtel Assoc. Professional Corp.*, 522 F. Supp. 1094, 1096 (D. Va. 1981) ("Knowledge and appreciation of a risk is not the same as the 'intent' to cause injury. Neither knowingly permitting a hazardous work condition to exist, nor willfully failing to furnish a safe place to work, nor even willfully violating a safety statute, constitutes the requisite intent.").

district court below properly followed *Aaron v National Union Fire Ins. Co.*, 876 F.2d 1157 (5th Cir. 1989), *cert denied*, 493 U.S. 1074 (1990) (cited at Pet. App. 6a, 8a, 9a), which opined that "the preemptive force necessary to create removal jurisdiction should only be held to exist when 'Congress has clearly manifested an intent to make causes of action . . . removable to federal court.'" *Id.* at 1163 (quoting *Taylor*, 481 U.S. at 68 (Brennan, J., concurring)). But this statement of the law is plainly *incorrect* after *Beneficial Nat'l Bank*, 539 U.S. at 9 n.5.

Respondent ignores another important change occasioned by *Beneficial Nat'l Bank* and *Aetna Health Ins.* Both recent decisions instruct that a significant factor in the complete preemption doctrine is the federal interest in preserving the uniformity of a comprehensive statutory scheme. 539 U.S. at 10-11; 124 S. Ct. at 2495. As we have shown, the same federal interest lies at the heart of the LHWCA. Accordingly, this case would be an excellent vehicle for the further clarification and refinement of the complete preemption doctrine. At a minimum, because the courts below applied an improper legal test that conflicts with governing precedent of this Court, this Court should GVR in light of *Aetna Health Ins. v. Davila*, 124 S. Ct. 2488 (2004).

6. Respondent offers 28 U.S.C. § 1447(d) as a reason to deny review. BIO 4-7. However, the Fifth Circuit did not cite that statute in its Order, Pet. App. 1a, and Respondent's brief in the Fifth Circuit addressed § 1447(d) only in passing.

In any event, § 1447(d) is no barrier to review in this case. The issue of the proper construction of the LHWCA – and whether it displaces Respondent's state-law tort remedy – is antecedent to the question of subject-matter jurisdiction. Indeed, it is separate from the issue of remand: under SSA Gulf's view, the LHWCA required that the district court enforce the exclusivity provisions of the LHWCA by dismissing the case,

not by remanding to the state court. The issue is not simply the jurisdictional question of whether Respondent's state-law tort claims should proceed in federal court or in state court; the issue is whether the tort claims may proceed *at all* in *any* court in light of the LHWCA's exclusivity provisions mandating their dismissal. *See Waco v. United States Fidelity & Guar. Co.*, 293 U.S. 140, 143 (1934) (appellate court had power to review issue which "preceded that of remand"); *Borneman v. United States*, 213 F.3d 819, 825 (4th Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001) (fact that district court's decision cited § 1447(c) is not sufficient to trigger § 1447(d) because "[t]he district court's conclusion that it did not have subject matter jurisdiction was premised on two antecedent decisions that are both judicially reviewable and appealable"); *Aliota v. Graham*, 984 F.2d 1350, 1353 (3d Cir.) (review not barred where a statutory issue under 28 U.S.C. § 2679(d) was the impetus behind the remand, but was also "separate from and logically preceded the question of remand"), *cert. denied*, 510 U.S. 817 (1993); *Mitchell v. Carlson*, 896 F.2d 128, 132-33 (5th Cir. 1990) (finding issue separable and reviewable under *City of Waco*); *In re Adams*, 809 F.2d 1187, 1188-89 (5th Cir. 1987) (same regarding the dismissal of bankruptcy appeal); *Gallea v. United States*, 779 F.2d 1403, 1404 (9th Cir. 1986) (same regarding dismissal of United States in tort suit).

Section 1447(d) is not automatically triggered merely because the district court's remand order cited § 1447(c) and was purportedly based on lack of subject-matter jurisdiction. *See Poore v. American-Amicable Life Ins. Co.*, 218 F.3d 1287, 1291 (11th Cir. 2000) (remand order based on lack of subject-matter jurisdiction reviewable where "the district court exceeded its authority under § 1447(c)"); *Xiong v. Minnesota*, 185 F.3d 424, 427 (8th Cir. 1999) (where district court held that it lacked subject matter jurisdiction but "case law dictated that jurisdiction was proper at the time of removal," § 1447(d) was no bar to review: "Because the district court remanded a properly removed

cause on grounds the court lacked authority to consider, the remand order is reviewable on appeal.").

Accordingly, § 1447(d) does not preclude review of the LHWCA question presented by this case. That is the import of such decisions as *Kircher v. Putnam Funds Trust*, 373 F.3d 847, 850 (7th Cir. 2004); *In re TMI Litigation Cases Consolidated II*, 940 F.2d 832, 844 (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992); and *Nasuti v. Scannell*, 906 F.2d 802, 808 (1st Cir. 1990), which were cited in the Petition at 24 but entirely ignored by Respondent.

Under Respondent's view, federal appellate courts would lack authority to protect comprehensive congressional schemes from interference by state courts. Respondent's suggestion that SSA Gulf could raise its federal claim in state court introduces the very evil that Congress aimed to prevent: having state judges and juries (rather than federal administrators and courts of appeals) resolve disputed issues under the exclusively federal LHWCA scheme. *See Powers v. Southland Corp.*, 4 F.3d 223, 229-30 (3d Cir. 1993) (holding that § 1447(d) was no bar to review because, "if there is independent appellate jurisdiction over an issue under the governing federal statutes, the fact that the district court may have remanded the case cannot deprive the court of appeals of the jurisdiction granted to it by Congress"; "the essence of the defendant federal employee's complaint was that she would be subjected to suit in state court although she had a statutory right to be immune from suit").

The Fourth Circuit recognized the same principle in *Shives*, 151 F.3d at 167. Although Respondent argues that the remand in that case was not based on § 1447(c), *see* BIO 7, nothing in the *Shives* decision turned on the statutory provision under which the remand was issued. Rather, the Fourth Circuit explained that, "because the coverage question of the LHWCA is a conceptual antecedent for the district court's remand order, it would appear that we are not prohibited by § 1447(d) from

reviewing that order." 151 F.3d at 167. "If we have any doubt about the correctness of this analysis, we are authorized in these circumstances to issue a writ of mandamus. To avoid forfeiting the federal courts' role of reviewing LHWCA coverage issues is one of those extraordinary situations envisioned in *Thermtron* for exercise of the writ." *Id.* at 167-68. Precisely the same reasoning is applicable here.

Hence, § 1447(d) does not provide a reason to deny review. If anything, any conflict between the Fifth Circuit and the other courts of appeals regarding the interpretation of § 1447(d) would provide a further reason to grant review.

CONCLUSION

The petition for writ of certiorari should be granted. In the alternative, this Court should grant the petition, vacate the judgment below, and remand for reconsideration in light of *Aetna Health Ins. v. Davila*, 124 S. Ct. 2488 (2004).

Respectfully submitted.

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